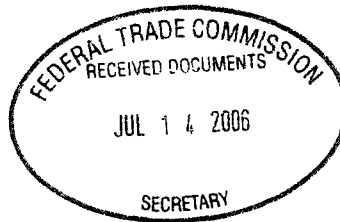


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July 14, 2006

**VIA FEDERAL EXPRESS**

Federal Trade Commission  
Office of the Secretary  
Room H-135 (Annex W)  
600 Pennsylvania Avenue  
Washington, DC 20580

Re: Business Opportunity Rule, R511993

Dear Commissioners,

On April 12, 2006, the Federal Trade Commission ("FTC") issued a Notice of Proposed Rulemaking ("NPR") proposing regulations to address deceptive trade practices in the sale of business opportunities. The NPR was part of a process begun in the mid 1990's to modify the original regulations promulgated in the late 1970's that applied to the sale of both franchises and business opportunities. The NPR invited comments to the Proposed Regulations. As an interested citizen and an attorney whose practice primarily involves companies engaged in franchising, I submit the following comments for your consideration.

First, let me express my appreciation for the FTC's efforts to separate the Business Opportunity Rule from the Franchise Rule. As clearly explained in the NPR, franchises and business opportunities have sufficiently different characteristics and risks to the potential investors to justify separate treatment and disclosure obligations. With the proposed changes to the application of the Franchise Rule to the sale of franchises, there is now a clear need to streamline the disclosure requirements for the sale of business opportunities.

I support the goals of the Proposed Business Opportunity Rule; however, certain aspects of the Proposed Rule may have unintended consequences. The Proposed Rule may encompass the sale of goods or services in situations that are very different from a business opportunity. In addition, the Proposed Rule places certain sellers of products in a situation where the identical product can be sold under identical circumstances to different purchasers, with some of these transactions being subject to pre-sale disclosure under the Proposed Rule and others not subject to these requirements. It will require sellers of these products to provide business opportunity

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disclosures to all potential purchasers, some of whom are clearly are not the class of purchasers which the Proposed Rule is intended to protect. Given the size of many sales forces and the requirements of the Proposed Rule, the effect will be to create an unmanageable situation for these sellers which will likely discourage, if not preclude, sales of their products without the attendant benefit the Rule seeks to implement. I will clarify these concerns later in this letter.

These unintended consequences can be remedied by modifying the Proposed Business Opportunity Rule to:

1. Create additional exempt or excluded transactions; and
2. Clarify the definition of "New Business" in Proposed Section 437.1(k).

### **Proposed Exemptions and Exclusions**

Currently, the only exemption to the application of the Proposed Business Opportunity Rule are transactions which qualify as franchises under the Proposed new Franchise Rule (*See* NPR at 19078; Proposed Section 437.7). The Proposed Franchise Rule recognizes that certain transactions may meet the definition of a franchise, but do not warrant the disclosures required by the Proposed Franchise Rule. Consequently, the Proposed Franchise Rule creates some sensible exemptions so that the application of the disclosure requirement is not broader than it needs to be to accomplish the Franchise Rule's purposes. That same logic is applicable to the Proposed Business Opportunity Rule. It is appropriate to add comparable exemptions to narrow the scope of the Proposed Rule's application to encompass only those transactions involving the potential purchasers the Rule seeks to protect. One exemption which would not impact the Rule's purpose would be an exemption analogous to the franchise exemption for transactions with franchisees of sufficient net worth (Franchise Rule Proposed Section 436.8(a)(5)(ii)). Another would be an exemption analogous to the exemption for franchisees that make a significant investment. (Franchise Rule Proposed Section 436.8(a)(5)(i); *see* Staff Report to the Federal Trade Commission and Proposed Revised Trade Commission Rule, August 2004, Proposed Section 436.8). Finally, to assure that the Proposed Rule does not have unintended consequences without any attendant benefit, exemptions excluding transactions that comprise less than twenty percent (20%) of the potential purchaser's total revenues and transactions that are terminable by the purchaser, without cause, on notice of thirty days or less would exclude those situations such as described in the example below.

The NPR explains that the sweeping application of the proposed disclosure requirements in the Business Opportunity Rule is offset by the streamlined disclosures and relatively small cost of compliance. While this may be true, in the case of transactions with experienced and sophisticated sellers and purchasers, even the minimal nature of the disclosures is unnecessary and does not impact the concerns which the Proposed Rule seeks to address. In many of these situations, numerous people are involved in the transaction, from various employees inside of the purchaser's organization to its attorneys, accountants and other

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advisors and consultants. If all of these people must be provided with the disclosures, this places a heavy burden on the seller and creates the risk of an inadvertent omission subjecting the seller to significant liability while at the same time not alleviating or addressing the situations which the Proposed Rule is intended to address. Even if everyone involved in the transaction were not entitled to the disclosures, there is no assurance that the ultimate decision makers, who may have little if no contact with the seller, will receive or give any significance to the disclosures. All of the information required to be disclosed is easily obtainable from other sources by these purchasers.

**Definition of “New Business”**

The current proposed definition of “New Business” states as follows:

(k) *New business* means a business in which the prospective purchaser is not currently engaged, or a new line of type of business.

To effectuate the Proposed Rule’s purpose better, this definition should be clarified in three respects. First, “business” should not include operations which are ancillary or support the prospective purchaser’s current operations. Second, “business” should be defined to include only an operation that can stand alone and does not require the sale of other products or services to make it a viable operation. Third, “line or type of business” should be defined to require that the new “line or type of business” be significant to the prospective purchaser’s overall operation. Clarifying the definition of “New Business” in these respects will accomplish the FTC’s goal of not including transactions which involve simply the sale of goods and services, even though substantial support and training may be provided to help the prospective purchaser use or resell the products or services. Defining “line or type of business” to add a significance element, similar to the fractional franchise exemption under the current and Proposed Franchise Rule, further accomplishes the FTC’s goals by eliminating those transactions where the prospective purchaser’s risk or dependence on the seller is minimal.

The NPR distinguishes training to run the business from training to use the products properly (*See* NPR at 19063). At the same time, “business assistance” in Proposed Section 437.1(c) is defined very broadly and arguably includes marketing assistance to help the proposed purchaser sell the products or services. Where the prospective purchaser is dependent upon this marketing assistance to sell all or substantially all of the products and services it makes available to its customers, disclosures of the risks of the business are appropriate. Where, however, the use and marketing assistance is limited to an ancillary product line that is part of a larger operation, such disclosures are not necessary because of the reduced dependence of the purchaser on the seller’s ability to provide this assistance.

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**Example**

An example of a situation covered by the Proposed Business Opportunity Rule will help to clarify my concerns. My example involves the national seller of a line of sandwiches who also sells the equipment to heat and store the sandwiches and provides signage and paper products for use with the sandwiches. The company has hundreds of salespeople all over the country and thousands of accounts. Applying the Proposed Rule to this seller would result in it having to train all of its salespeople all around the country and require the salespeople to maintain meticulous records to evidence the company's compliance with the Rule. This would place an unreasonable and burdensome expense on the seller. If this seller sold its sandwiches, equipment and supplies to businesses such as an automobile dealership, law firm, accounting firm, or other business for resale to their employees and visitors, while the addition of this service would arguably be a "new line of business", such a purchaser would not be dependent on the sales of these sandwiches for its viability. These purchasers would likely have a sufficient net worth so that if this service proved to be a financial loss, the core business would not suffer adversely. Finally, if the company was a well established or sophisticated company with a long history of business operations and internal expertise, it would be able to obtain adequate information to evaluate the investment without the disclosures required by the Proposed Rule. Contrast this with the identical products sold to a convenience store operator who replaces an existing line of sandwiches. Since the latter is not establishing a new business or a line of business, the sale would not require the Business Opportunity Rule disclosures. The two situations should be treated similarly and neither should be subject to the Business Opportunity Rule. A revision to the definition of "new line of business" and well worded exemptions would negate the creation of significant expense for businesses for compliance and at the same time, would keep in tact the scope of the Proposed Rule's intended benefit.

**Conclusion**

I thank you for your consideration of my comments. They are offered for the purpose of furthering the FTC's goals of requiring pre-sale disclosure of relevant information about business opportunities in circumstances where pre-sale disclosure is warranted due to the potential risks being incurred by the purchaser, nature of the investment being made by the purchaser, and ability of the purchaser to obtain information about the seller to adequately evaluate the investment while at the same time alleviating the impact of capturing transactions which do not fall within those categories. I look forward to the revision to Proposed Business Opportunity Rule incorporating my comments and those of my colleagues.

Sincerely yours,

~~Snell & Wilmer~~

Jeffrey A. Brimer